

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 16-428
	:	
DAVID T. SHULICK	:	

**DEFENDANT’S BENCH MEMORANDUM REGARDING  
IMPEACHMENT UNDER FED.R.EVI. 806**

The government alleges that Mr. Shulick conspired with Chaka Fattah Jr. (“Fattah”). The government has introduced evidence that Fattah and others worked for Mr. Shulick at DVHS. Consequently, the Court has allowed the government to introduce out-of-court statements of Fattah and other DVHS employees as non-hearsay under Federal Rule of Evidence 801(d)(2), or as business record exceptions to the hearsay rule.<sup>1</sup> Significantly, the government has elicited numerous written and oral statements of Fattah concerning the intended staffing and payment of employees at the Southwest school, as well as statements by Fattah to PNC bank concerning the loan repayment.

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<sup>1</sup> The government has not expressly invoked Rule 801(d)(E) – co-conspirator statements – as the basis for admission of Fattah’s statements, but it is conceivable that it may seek to do so. The same analysis discussed in this memorandum applies to the impeachment of persons whose hearsay statements are admitted as co-conspirator statements through Rule 801(d)(E).

The government does not intend to call Fattah as a witness. Thus, the defendant will not have the opportunity to impeach Fattah directly as a live witness. Federal Rule of Evidence 806 remedies this fundamental unfairness by allowing the defense to attack the credibility of a declarant whose statement has been admitted under a hearsay exception, or as non-hearsay under Rule 801(d)(2)(C), (D), or (E), **“by *any evidence* that would be admissible for those purposes if the declarant had testified as a witness.”** Fed.R.Evi. 806. As noted when this rule was enacted, **statements admitted under Rule 801(d)(2)(C), (D), and (E) “should open the declarant to attacks on his credibility.”** Fed.R.Evi. 806, Advisory Committee Notes, 1974 Enactment.

The impeachment allowed by Rule 806 is wide-ranging. Among the impeachment allowed by Rule 806 is **subsequent** – as well as prior – inconsistent statements or conduct of the declarant. Fed.R.Evi.806 (“The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.”)

Given the government’s repeated reliance on writings and oral statements of Fattah, defendant is entitled under Rule 806 to impeach Fattah by eliciting from other witnesses the same sorts of impeachment that would be elicited directly if Fattah were to testify.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Ann C. Flannery, counsel for defendant David Shulick, hereby certify that on this 6th day of May, 2018, I caused a true and correct copy of the foregoing **DEFENDANT'S BENCH MEMORANDUM REGARDING IMPEACHMENT UNDER FED.R.EVI. 806** to be served by ECF upon all counsel of record, including the following:

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